TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted]208

BALTIMORE & OHIO RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED NOVEMBER 17, 1921.

(28,575)

(28,575)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 620.

BALTIMORE & OHIO RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 25, 1921.

1

1. PETITION AND EXHIBIT No. 1.

Filed May 4, 1921.

In the Court of Claims of the United States.

No. 104-A.

BALTIMORE & OHIO RAILROAD COMPANY

vs.

THE UNITED STATES.

Petition.

To the Honorable the Chief Justice and Judges of the Court of Claims:

Your petitioner respectfully shows unto your honors the following facts:

1. Petitioner is a corporation organized under the laws of the State of Maryland and operates, and at the time hereinafter stated did operate, a system of railroads in Interstate Commerce in the United States. That prior to November 12, 1918, and on or about
2 the fifteenth day of December, 1917, your petitioner entered into an informal or implied agreement with an officer or agent acting under the authority, direction or instruction of the Secretary of War of the United States on behalf of the United States for the payment by the United States to your petitioner for extraordinary expenses incurred by your petitioner in connection with the construction of the Marley Neck Branch Railroad of your petitioner situated in the State of Maryland, and for the payment of the construction of a special detour track, trestle and turnout in connection with the construction of said Marley Neck Branch Railroad to the site of the United States Ordnance Depot, Curtis Bay, Maryland, for transportation purposes. There is due and owing your petitioner by the United States for the aforesaid construction covering cost of facilities including labor, material and equipment rental the sum of eighty-five thousand, four hundred, seventy-four dollars and six cents ($85,474.06).

2. The nature, terms and conditions of the informal or implied agreement in the matter of the claim of your petitioner are as follows:

Previous to the summer of 1917, surveys had been made and adopted by your petitioner for a railroad known as the Marley Neck Branch Railroad to extend along the west side of Curtis Creek in the State of Maryland from a point on your petitioner's Curtis Bay Branch Railroad in said State of Maryland, near the Standard Guano

Company's plant in the city of Baltimore, Maryland, to Thomas Point, Maryland; thence crossing Curtis Creek in the State of Maryland at the aforesaid Thomas Point, Maryland, on a bridge and from said bridge thence in a southwesterly direction to the
3 Magothy River in the State of Maryland. The said Marley Neck Branch Railroad as described aforesaid was projected for the purpose of developing the territory in the valley of Curtis Creek, Maryland, and along the west shore of the Patapsco River in the State of Maryland.

During the late summer of 1917 the War Department of the United States decided to construct and did construct an Ordnance Depot between Curtis Creek and Back Creek in the State of Maryland. The line location of the Marley Neck Branch Railroad as heretofore set forth passed directly through the location of the said Ordnance Depot and the United States on this account insisted that the line of the said Marley Neck Branch Railroad be changed in order that it would pass along one of the sides of the proposed Ordnance Depot location and not directly through the center of said location. In order, therefore to comply with the request of the United States your petitioner decided to locate the crossing of its said Marley Neck Branch Railroad over the said Curtis Creek, as heretofore referred to, at Stahl's Point, Maryland, instead of Thomas Point, Maryland. This change of plans involved extensive surveys, and a very radical relocation of the line of the said Marley Neck Branch Railroad on both sides of Curtis Creek, Maryland. The said surveys were not completed until some time in November, 1917. On September 25, 1917, your petitioner contracted with the McLean Contracting Company, of Baltimore, Maryland, on a unit-price basis, for the construction of the portion of the new line of railroad of the said Marley Neck Branch Railroad from a point on your petitioner's Curtis Bay Branch Railroad near the Standard Guano Company's plant in the City of Baltimore, Maryland, to a point adjacent to the site
4 of the said proposed United States Ordnance Depot between Curtis Creek and Back Creek in the State of Maryland. The surveys, heretofore set forth with respect to the relocation of the said line of the Marley Neck Branch Railroad were still being made at the time of the letting of the contract by your petitioner to the McLean Contracting Company and that the final location of the Marley Neck Branch Railroad in the vicinity of Curtis Creek Crossing, Maryland, was not definitely determined until a later date, the contractor, the McLean Contracting Company, was unable to begin its operations on the said Marley Neck Branch Railroad south of Cabin Branch, Maryland, for the aforesaid reasons until November 16, 1917. The McLean Contracting Company, by the terms of the said contract with your petitioner, were required to complete said contract on or before December 25, 1917, but by reason of the delay heretofore explained for which they were not responsible, your petitioner would have extended the time of the said McLean Contracting Company for completing the said contract to at least February 25, 1918, and the said construction having to be done in the winter months, through no fault of the said contractor, the McLean Contracting Company, your petitioner would no doubt have had to extend the time to even

a much later date than February 25, 1918. Early in December of 1917 it had become apparent to the officers of the United States War Department that the construction of the said Marley Neck Branch Railroad would be delayed to such an extent that the War Department's operations at the United States Ordnance Depot, Curtis Bay, Maryland, would be seriously delayed. On December 15, 1917, and subsequently thereto, the officers of the United States War
5 Department at Washington, D. C., and those at the said Curtis Bay Ordnance Depot insisted that the said Marley Neck Branch Railroad be completed at the earliest possible date. This is strongly emphasized, for under date of December 15, 1917, F. M. Gunby, Major, Quartermaster R. C. of the United States Army, then stationed at Washington, D. C., wrote a letter to your petitioner for the attention of its General Superintendent, M. H. Cahill, at Baltimore, Maryland, as follows:

"War Department,

Office of the Quartermaster General of the Army,

Washington, D. C.

December 15, 1917.

No. 617 CR-E (Curtis Bay).

From: Officer in Charge of Cantonment Construction.

To: Mr. M. H. Cahill, General Superintendent, B. & O. R. R. Co., Baltimore, Md.

Subject: Curtis Bay Track Facilities.

"1. Confirming conversation with your chief clerk today, will state that we are exceedingly anxious for you to get your branch line now under construction, extended to our Curtis Bay Ordnance Depot. Since the original plans were made, we have added to this layout two (2) very large warehouses which will mean a great increase in the amount of freight to be handled through this terminal. It is very urgent that we have track facilities both for handling construction material and freight at the earliest possible moment. It seems to us from observation on the ground that our operations are going to be very seriously hampered by lack of track facilities unless your company is able to greatly increase progress being made on construction at this branch.

6 2. If you desire, I should be pleased to meet you on the ground and go over this matter at an early date.

3. Please address your reply to the personal attention of Mr. R. M. White.

By authority of the Secretary of War.

I. W. LITTELL,
Brigadier General, Q. M. Corps, N. A.,
In Charge of Cantonment Construction.
By F. M. GUNBY,
Major, Quartermaster, R. C."

F. M. G. R. M. W. E. D.

It will be very clearly noted that the aforesaid letter of Major F. M. Gunby particularly emphasizes the construction of the said Marley Neck Branch Railroad for the urgent needs of the United States for the handling of construction material and freight to the United States Ordnance Depot at Curtis Bay, Maryland. This urgent communication of Major Gunby was referred by the said M. H. Cahill on December 20, 1917, to H. A. Lane, Chief Engineer of the Baltimore and Ohio Railroad Company, and was by Mr. Lane referred for action on December 28, 1917, to Mr. J. T. Wilson, District Engineer of the Baltimore and Ohio Railroad Company at Baltimore, Maryland.

In order, therefore, to meet the urgent needs of the United States, as hereinbefore set forth, it became necessary for your petitioner to cancel its said contract with the McLean Contracting Company for the construction of the said Marley Neck Branch Railroad, as heretofore set forth, on the basis of unit price and contract with
7 another contractor upon a cost plus basis in order to expedite the construction of the said Marley Neck Branch Railroad for the urgent needs of the United States.

Your petitioner on January 5, 1918, therefore determined to cancel the unit price contract it had with the McLean Contracting Company for the construction of the said Marley Neck Branch Railroad and did cancel said contract. On January 5, 1918, a contract was entered into between your petitioner and the Empire Engineering Company to complete the work of construction of the said Marley Neck Branch Railroad on a cost plus basis and said Empire Engineering Company commenced work on said construction on January 6, 1918, and continuously pursued the work both day and night from the said January 6, 1918, until the completion of the said construction in the latter part of February, 1918. Your petitioner in order to abrogate its said contract for the construction of the said Marley Neck Branch Railroad with the McLean Contracting Company was required to pay the said McLean Contracting Company for all the construction work that had been done by the said McLean Contracting Company to January 6, 1918, on a cost plus basis and no payment was made to the said McLean Contracting Company on the unit price as set out in the original contract between your petitioner and the said McLean Contracting Company heretofore referred to.

In addition to the letter of Major Gunby, heretofore set forth, Major Ralph F. Proctor, of the United States Army, Constructing Quartermaster at Camp Meade, Maryland, and the United States Ordnance Depot at Curtis Bay, Maryland, stated to George S. Harlan, Chief Clerk to A. W. Thompson, Vice-President of the Balti-
8 more and Ohio Railroad Company, on or about November 6, 1917, that the War Department desired to have the Marley Neck Branch Railroad constructed to the United States Ordnance Depot at Curtis Bay and in addition to the said request there were a number of conferences between the said Major Ralph F. Proctor and the said George S. Harlan relating to ways and means to have the said Marley Neck Branch Railroad constructed as quickly as

possible and the said George S. Harlan did urge the engineering department of your petitioner to speed up the work of construction in every possible way so as to render every assistance to the United States during the emergency that then existed. That Major Fred A. Wood, of the United States Army, Constructing Quartermaster at the United States Ordnance Depot at Curtis Bay, Maryland, conferred a number of times with Mr. J. T. Wilson, Consulting Engineer of your petitioner, in order to expedite the construction of the said Marley Neck Branch Railroad. That Smith, Hauser and McIsaac, contractors for the United States at the United States Ordnance Depot, Curtis Bay, Maryland, acting through F. J. McIsaac of said firm conferred and cooperated with officers of the United States War Department in assisting to find ways and means to expedite the construction of the said Marley Neck Branch Railroad in order to obtain material for the construction of the said United States Ordnance Depot at Curtis Bay, Maryland, as it was difficult to have the material brought to the said United States Ordnance Depot unless it was transported over the said Marley Neck Branch Railroad.

3. Your petitioner contends that it should be compensated by the United States for the excess cost of the construction of the entire Marley Neck Branch Railroad, in excess of the cost of the said road at the original unit price as agreed to by your petitioner with the
9 McLean Contracting Company and that the extraordinary expenses incurred in the construction of hurrying the completion of said Marley Neck Branch Railroad were such from which your petitioner derived no benefit and will not derive any benefit. The extraordinary expenses were made on urgent demand of the United States War Department and were solely for the benefit of said War Department. Your petitioner annexes hereto (Exhibit No. 1). Detailed statement showing the articles or work delivered to and accepted by the United States, and the exact nature and extent of all expenditures, obligations or liabilities necessarily incurred, including all work, labor and services necessarily rendered by your petitioner. The total amount of said claim is eighty-five thousand, four hundred, seventy-four dollars and six cents ($85,474.06).

4. Petitioner presented its said claim in the amount of $9,058.55, on June 27, 1919, to the War Department under the provisions of the act of March 2, 1919, 40th Stat. L., 1272. The said claim was amended on April 2, 1920, and the amount increased to $85,474.06. On June 4, 1920, the Claims Board, Transportation Service, War Department, denied relief to your petitioner. Appeal was taken from the said decision of the Claims Board, Transportation Service, to the Appeal Section, War Department, and a hearing was had before said Appeal Section on July 16, 1920. Under date of August 12, 1920, said Appeal Section denied relief to your petitioner, but in its decision said:

"While the construction in question inured to the benefit of the War Department by enabling it to get certain of its materials into the Ordnance Supply Depot at Curtis Bay, yet that was not the sole object of the construction of this track."

10 Under date of August 20, 1920, your petitioner appealed from the decision of the said Appeal Section to the Secretary of War and under date of November 24, 1920, that official denied relief to your petitioner.

5. That no action upon your petitioner's foregoing claim has been had before Congress. That said claim was presented to the Secretary of War, and that the total amount of said claim, $85,474.06, was disallowed by the Secretary of War, and your petitioner protested the disallowance of the said amount to the Secretary of War under date of August 20, 1920, but to no avail, and said Secretary of War adheres to his said action of rejection. That no transfer or assignment of said claim or any part thereof or interest therein has been made. That said claim is now owned by your claimant, and no other person or corporation is the owner thereof or is interested therein, and that your petitioner is justly entitled to the amount herein claimed from the United States after allowing all just credit and set-offs; that your claimant has at all times borne true allegiance to the United States, and has not in any way voluntarily abetted or given encouragement to rebellion against said Government.

Prayers.

Wherefore your claimant prays:

1. That the court will render a judgment against the United States in favor of your claimant for payment by the United States to your claimant of the said sum of eighty-five thousand, four hundred seventy-four dollars and six cents ($85,474.06).

11 2. That your claimant may have such other and further relief as the nature of the case may require and to the court may seem meet and proper.

BALTIMORE AND OHIO RAILROAD COMPANY,
By W. D. OWENS, *Assistant Comptroller.*

JOHN F. McCARRON,
Attorney of Record.
GEORGE E. HAMILTON,
Of Counsel.

STATE OF MARYLAND,
City of Baltimore, To wit:

W. D. Owens, being duly sworn, says he is Assistant Comptroller for the Baltimore & Ohio Railroad Company; that he has authority to subscribe to and verify the foregoing petition from said company, that he has read said petition, knows the contents thereof and the facts therein stated, and that he believes the same to be true.

GEO. W. HAULENBEEK,
Notary Public, State of Maryland.

My commission expires May 1, 1922.

STATE OF MARYLAND,
City of Baltimore, To wit:

C. W. Woolford, being first duly sworn, he says he is Secretary of the Baltimore & Ohio Railroad Company; that W. D. Owens who has subscribed to and verified the petition of said company hereto, is authorized to do so.

C. W. WOOLFORD.

12 Subscribed and sworn to before me this 27 day of April A. D. 1921.

GEO. W. HAULENBEEK,
Notary Public, State of Maryland.

My commission expires May 1, 1922.

EXHIBIT No. 1.

United States Government—War Department—to The Baltimore & Ohio Railroad Company, Dr.

For Excess cost of construction of Main Line, Marley Neck Branch and Detour Track west of Cabin Branch incident to construction of Ordnance Depot for U. S. Government at Curtis Bay, Md., together with cost of connection to Ordnance Depot as per details attached:

(1) Excess Cost of Main Line	$74,851.33
(2) Detour Track	9,582.86
(3) Connection to Ordnance Depot	939.87
Total	$85,474.06

Statement of Excess Costs.

Item.	Quantity.	Contract unit price.	Total cost contract unit prices.	Actual unit prices.	Actual cost.	Unit price excess.	Excess cost.
Grading	46,848 C. Y.	$0.64	$29,982.72	$1.93	$90,661.34	$1.29	$60,678.62
Grading, Cinder Fill (Trestle)	4,368 C. Y.	0.40	1,747.20	0.40	1,747.20	.....	.....
Grading, Cinder Fill (Road-bed)	2,682 C. Y.	.....	.....	2.40	6,388.80	2.40	.....
Bridges, Trestles, and Culverts:							
Permanent Trestle:							
Piling	5,052 Ft.	0.85	4,294.20	0.94	4,755.61	0.09	461.43
Timber in Place	71,082 M. B. M.	100.00	7,108.29	128.37	9,124.33	28.37	2,016.13
Concrete Pipe, 18"	288 Ft.	4.00	1,072.00	6.97	2,008.00	3.97	936.00
Concrete Pipe, 24"	254 Ft.	6.50	1,651.00	9.00	2,286.00	2.50	635.00
Ties:							
No. 1 Treated	417 Ea.	1.05	437.85	1.05	437.85	.....	.....
No. 2 Treated	3,000 Ea.	0.95	2,944.05	0.95	2,944.05	.....	.....
Switch Timber	3,500 B. M.	30.00	105.00	30.00	105.00	.....	.....
Rail:							
90-lb. Repair	196.85 Ton.	35.00	7,062.40	35.00	7,062.40	.....	.....
Other Track Material:							
Angle Bars, 90-lb. Repair	888 Ea.	0.35	312.53	0.35	312.53	.....	.....
Bolts, 1" x 4¾"	1,925 Ea.	0.066	126.99	0.066	126.99	.....	.....
Spikes	58 Kegs.	5.535	321.10	5.535	321.10	.....	.....
Frogs	1 Ea.	32.50	32.50	32.50	32.50	.....	.....
Switch	1 Ea.	32.50	32.50	32.50	32.50	.....	.....
Switch Stand	1 Ea.	9.65	9.65	9.65	9.65	.....	.....
Guard Rails	2 Ea.	8.80	17.60	8.80	17.60	.....	.....

Ballast:							
Cinders	2,756 C. Y.	*0.40	1,102.40	0.40	1,102.40	.....	.....
Track Laying and Surfacing	7,425 Ft.	†1.35	10,023.75	1.85	13,750.10	0.50	3,735.35
Crossings and Signs:							
Overhead Bridge:							
Foundation Excavation	895 C. Y.	6.03	5,400.35	6.03	5,400.35	.....	.....
Foundation Concrete	89 C. Y.	25.50	2,289.05	25.50	2,289.05	.....	.....
Neat, Concrete	104 C. Y.	25.72	2,674.88	25.72	2,674.88	.....	.....
Steel	33,400 lbs.	.04745	1,585.72	.04745	1,585.72	.....	.....
Labor, Erecting Steel	35,000 lbs.	.034	1,183.10	.034	1,183.10	.....	.....
Labor, Grading Approaches	675 C. Y.	1.11	748.27	1.11	748.27	.....	.....
Flooring	11,091 M. B. M.	70.34	780.12	7.34	780.12	.....	.....
Land	.....	.....	50.00	.....	50.00	.....	.....
Grade Crossing:							
Lumber	415 l. f.	.029	11.46	.029	11.46	.....	.....
Labor Installing	.....	.....	30.00	.....	30.00	.....	.....
Engineering	.....	.....	83,136.59	.....	157,987.92	.....	74,851.33
			8,993.99	.....	8,993.99	.....	.....
			92,130.58	.....	166,981.91	.....	74,851.33

*Actual costs on this work.
†Actual costs for track laying and surfacing on jobs done at same time in vicinity of Baltimore.

14 Marley Neck Branch.

Cost of Labor Constructing and Removing Temporary Track We of Cabin Branch to Reach Curtis Bay Ordnance Depot in Advan of Completion of Main Line Construction.

Grading—2,000 c. y. @ $2.02	$4,034.0
Ballast—400 c. y. @ 0.40	160.0
Track Laying and Surfacing, 1,775 l. f. @ 1.83	3,248.2
Removing Track, 1,775 l. f. @ 0.91	1,624.1
	$9,066.4
Engineering	516.4
Grand Total	$9,582.8

From Point of Switch to Clearance.

Rail, 90# Repair	1.36	Tons	@	$865.00	$100.40
Switch Timber, 1 Set	3,500	B. M.	@	45.00	157.50
Angle Bars, 90# Repair	16		@	.96	15.36
Bolts, 1" x 4¾"	48		@	.10	4.80
Spikes	2	Kegs	@	10.875	21.75
Frogs, #8 15' 90# Repair	1		@	96.64	96.64
Switch, Complete 90# 16½'	1		@	76.69	76.69
Switch Stand	1		@	15.75	15.75
Guard Rails	2		@	15.04	30.08
Total Material					$518.97
Labor, Laying and Surfacing Turnout					$366.00
Labor, Supervision 15%					54.90
Total Labor					$420.90
Total					$939.87

Summary.

Total Material	$518.97
Total Labor	420.90
Total	$939.87

Marley Neck Branch.

Rail:						
Rail, 90# Repair	196.85	Tons	@	$35.00	$7,062.40	$7,062.40
Ties:						
Switch Timber	3,500	B. M.	@	30.00	105.00	.....
Ties, No. 1 Treated	417		@	1.05	437.85	.....
Ties, No. 2 Treated	3,099		@	.95	2,944.05	.....
						3,486.90
Other Track Material:						
Angle Bars, 90# Repair	888		@	.35	312.53	.....
Bolts, 1″ x 4¾″	1,925		@	.066	126.99	.....
Spikes	58	Kegs	@	5.535	321.10	.....
Frogs	1		@	32.50	32.50	.....
Switches, Complete	1		@	32.50	32.50	.....
Switch Stand	1		@	9.65	9.65	.....
Guard Rails	2		@	8.80	17.60	.....
						852.87
						$11,402.17

Summary.

Rail	$7,062.40
Ties	3,486.90
Other Track Material	852.87
	$11,402.17

(Here follows page Exhibit No. [illegible])

United States of America
Curtis Bay Ordnance Depot
100
"L H"
STAHL P
110
N65°35'E
120
120
130
4
20
ANNE ARUNDEL CO
BALTIMORE CI
140
United States of America
Coast Guard Depot
150
S67°28'E
Katherine R. Wa
160
170
2°20'
Arundel Cove
"L"
John W. Frick
To Hawkins Point
1. H.L. Tall
2. S.O. Heiskell
3. M.A. Stegman
4. E. Douglas
5. E.J. Janson
6. E. Douglas
7. E. Douglas
8. E. Douglas
9. B. Ott
10. August Wienhold
11. William Lange

17 Charles S. Walton & Co. Inc. - Tanners.
13 14 Chesapeake Ship Building Co.
15 Henry Smith & Son
16 August Smith.
17 George Stoll
EXHI
BALTIMOR
BALTIMORE D
MARLEY
GROUND LOCAT
STATION 12 T
ANNE ARUN
Scale, 1in.= 1000
Office of
Balti
J. Franklin Abell
CURTIS
HL. POINT
WALNUT POINT
CREEK
CABIN BRANCH
Frances B. Dalton
COUNTY
CITY
Hawkins Point Road
Sarah A. Coursey
Davison Chemical Co.
Swift & Co.
Watson
Davison Chemical Co.
SLEDDS POINT
CURTIS BAY
Associated Chemical Co.
Standard Guano
U.S Industrial Alcohol Co.
Baltimore Car & Foundry Co.
To Baltimor
6½° 1916
Private Rd.
Marsh Stream
18" Conc. Pipe 1x1 Wood Box.
2-24" Conc. Pipe
18" Conc Pipe
18" Conc. Pipe
County Rd. 24" Conc. Pipe 24" Conc. Pipe
County Rd.
Cabin Creek
18" Conc. Pipe
24" Conc. Pipe
Pennington Ave.
24" Conc. Pipe
18" Conc. Pipe

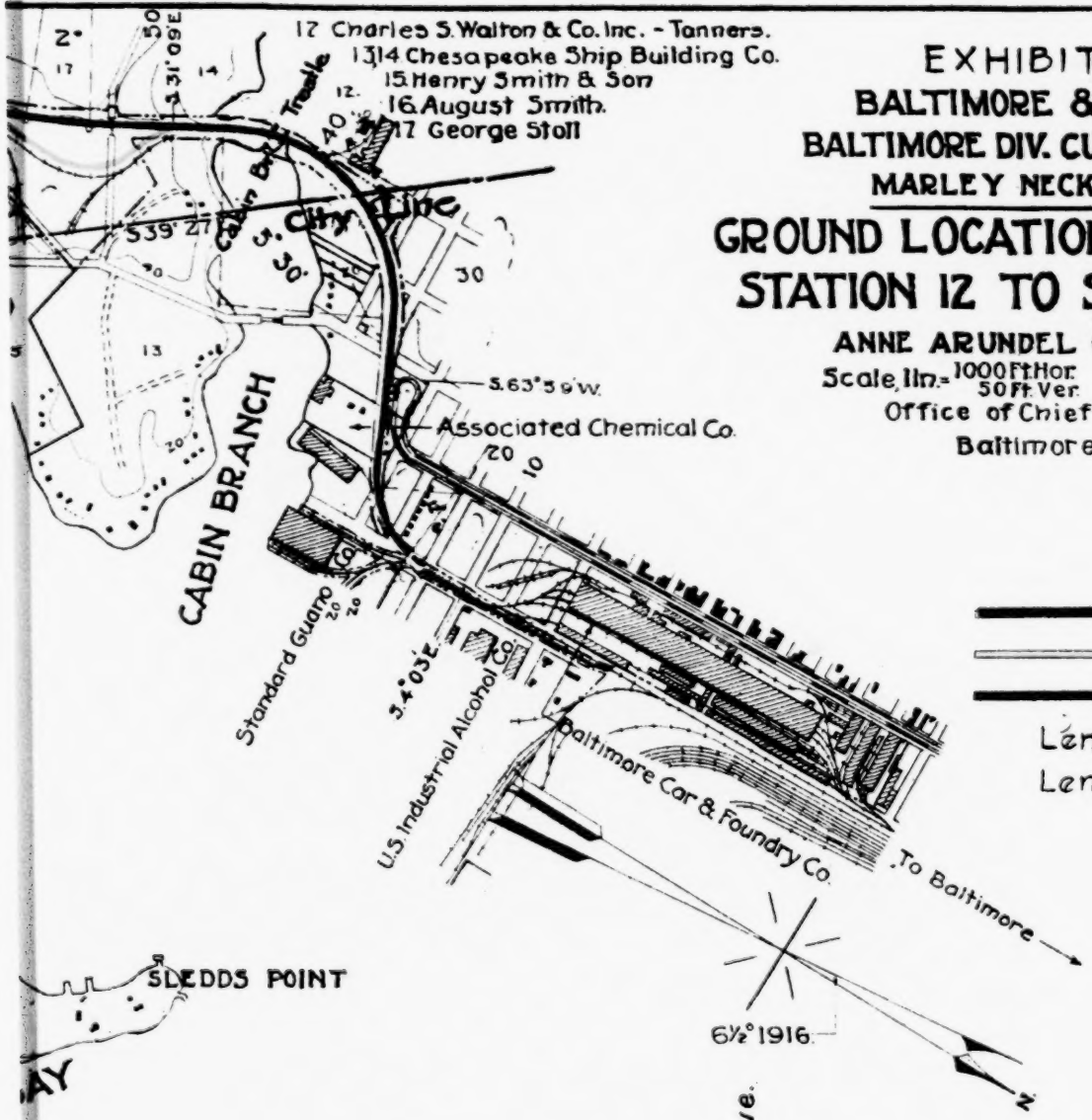


EXHIBIT # 2

BALTIMORE & OHIO R.R.

BALTIMORE DIV. CURTIS BAY MD.

MARLEY NECK BRANCH

GROUND LOCATION LA-LH-LI-LJ.

STATION 12 TO STATION 464

ANNE ARUNDEL CO. MD.

Scale, 1 In. = 1000 Ft. Hor. / 50 Ft. Ver. Jan, 1919

Office of Chief Engineer

Baltimore, Md.

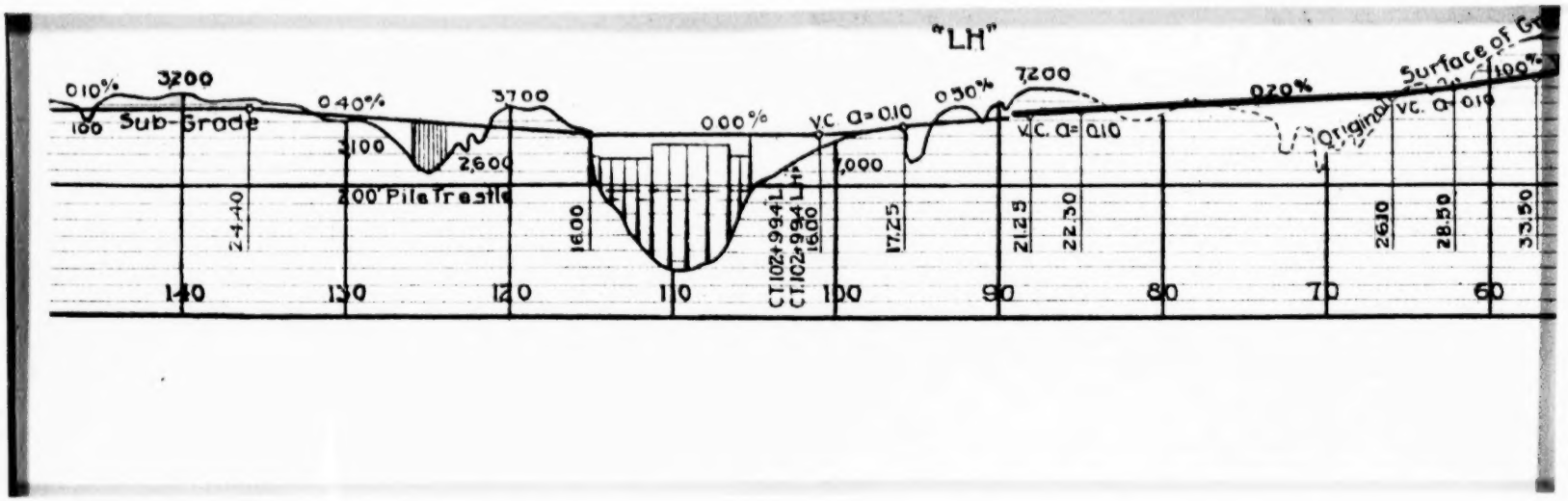
Main Line — 7672.7

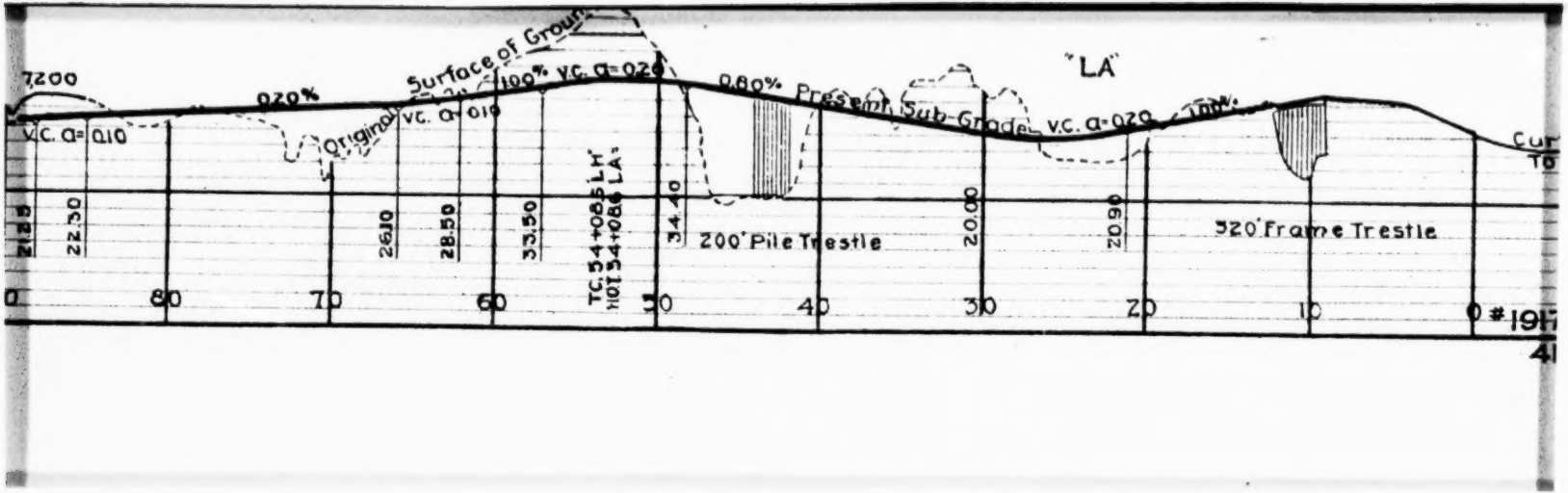
Detour Track

Connecting Track - 200'

Length - 2403.7' in City

Length - 5269.0' in County.


"LH"
010%
3200
100
Sub-Grade
040%
3100
2600
200' Pile Trestle
3700
000%
VC. a=0.10
050%
7200
7000
020%
Surface of Gr
100%
Original
VC. a=0.10
VC. a=0.10
2440
1600
1600
1725
2125
2230
2610
2850
3350
140
130
120
110
100
90
80
70
60


7200
0.20%
Surface of Groun
1.00% V.C. a=0.20
0.80% Present Sub-Grade V.C. a=0.20
"LA"
V.C. a=0.10
Original V.C. a=0.10
21.25
22.30
26.10
28.50
33.50
34.40
20.00
20.90
200' Pile Trestle
320' Frame Trestle
TC. 54+085 LH'
HOT 54+086 LA'
0
80
70
60
50
40
30
20
10
0 #191
41

18 II. *Demurrer.*

Filed June 29, 1921.

The United States, by the Attorney General, demurs to the petition filed herein upon the ground:

(1) That the petition does not state facts sufficient to bring the plaintiff within the class of persons referred to in Section 1 of the Act of March 2, 1919, (40 Stat. c. 94), known as the Dent Act, and to constitute a case specified in that section.

(2) That the Court is without jurisdiction to find and award the plaintiff any compensation whatsoever*soever* under Section 2 of said Act.

(3) That the petition does not state facts sufficient to constitute a cause of action under the general jurisdiction of the Court.

ROBERT H. LOVETT,
Assistant Attorney General.

J. ROBERT ANDERSON,
Special Assistant to the Attorney General.

19 III. *Argument and Submission of Demurrer.*

On October 11, 1921, the demurrer was argued and submitted by Mr. J. Robt. Anderson, for the defendant, and Mr. John F. McCarron, for plaintiff.

IV. *Opinion of the Court by Hay, J.*

Filed October 24, 1921.

HAY, *Judge*, delivered the opinion of the court:

This is a petition brought by the Baltimore & Ohio Railroad Company to recover from the United States the sum of $85,474.06. To this petition of the plaintiff the defendants have demurred.

The plaintiff alleges in its petition that prior to November 12, 1918, and on or about December 15, 1917, it entered into an informal or implied agreement with an officer acting under the authority, direction, or instruction of the Secretary of War on behalf of the United States for the payment by the United States to the petitioner for extraordinary expenses incurred by the petitioner in connection with the construction of the Marley Neck Branch Railroad of the petitioner situated in the State of Maryland, and for the payment of the construction of a special detour track, trestle, and turnout in connection with said construction to the site of the United States Ordnance Depot, Curtis Bay, for transportation purposes, and that there is due and owing to the petitioner for the aforesaid construction the sum of $85,474.06.

Not relying on the aforesaid allegation, the petitioner proceeds to set out in its petition the facts from which it deduces that an informal or implied agreement was entered into by the United States for the payment of the sum of money which it demands.

It is not necessary to set out in this opinion these facts which are recited in full in the petition. Suffice it to say that after a careful examination of the facts relied upon by the petitioner, the court is of opinion that no agreement can be inferred from them which obligates the United States to pay the money claimed to be due. The facts alleged in the petition do not disclose any agreement, express or implied, between the petitioner and the United States, and therefore this court can not give relief either under the Dent or Tucker Acts. In order to recover in this court under either act there must be a promise to pay, or the implication of a promise to pay. The demurrer of the defendant is therefore sustained, and the petition of the plaintiff is dismissed.

Graham, Judge; Downey, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

20 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Twenty-fourth day of October, A. D., 1921, judgment was ordered to be entered as follows:

This case was submitted upon the defendant's demurrer to the plaintiff's petition, on consideration whereof the court is of the opinion that the demurrer is well taken,

It is therefore Ordered, adjudged and decreed that the defendant's said demurrer to the plaintiff's petition be sustained, and that the petition be and the same is hereby dismissed.

By THE COURT.

VI. *Plaintiff's Application for and Allowance of an Appeal.*

Now comes the Baltimore and Ohio Railroad Company by its attorneys, George E. Hamilton, of counsel, and John F. McCarron, attorney of record, and appeals to the Supreme Court of the United States from the decision of this honorable court rendered in this cause in favor of the United States on October 24, 1921.

Very respectfully,

GEORGE E. HAMILTON,
Of Counsel.

JOHN F. McCARRON,
Attorney of Record.

Filed Nov. 10, 1921.

Ordered: That the above appeal be allowed as prayed for. Nov. 10, 1921.

By THE COURT.

21 Court of Claims.

No. 104-A.

BALTIMORE & OHIO RAILROAD COMPANY

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true copies of the pleadings in the above-entitled cause; of the argument and submission of case on demurrer; of the opinion of the Court by Hay, J.; of the judgment of the Court; of the application of plaintiff for an appeal to the Supreme Court and of the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Fifteenth day of November, A. D., 1921.

[Seal of Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,575. Court of Claims. Term No. 620. Baltimore and Ohio Railroad Company, appellant, vs. The United States. Filed November 17th, 1921. File No. 28,575.